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Cornish Town v. Evan O. Koller and Marlene B. Koller, husband and wife : Brief of Appellant

Utah Supreme Court

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SUPREME COURT OF UTAH

STATE OF UTAH

CORNISH TOWN, Plaintiff and Respondent, v. EVAN O. KOLLER and MARLENE B. KOLLER, husband and wife, Defendants and Appellants:	Case No. 880121

B R I E F O F A P P E L L A N T S

On Appeal from the Decision of the
First Judicial District Court of Cache County
State of Utah, Honorable VeNoy Christoffersen, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities:

STATEMENT OF JURISDICTION AND NATURE OF CASE

This appeal is from the judicial decisions of the Court entered by the Honorable VeNoy Christoffersen, Disrict Judge, denying defendants' claims for trial and determination of the claimed public need and necessity, the right for the jury to determine the fair market value of underlying mineral rights in the property, the right to present evidence of the fair market value of access permits for hunting rights, the right for assessment of attorneys' fees and costs for abandonment of claims, and the proper taxing of costs, and therefore, an appeal from the special jury verdict which was based upon those judicial decisions in the case of Cornish Town v. Evan O. Koller and Marlene B. Koller, Civil No. 25058, First Judicial District Court, Cache County, State of Utah. This Court has jurisdiction of this appeal under Utah Code Annotated §78-2-2(3)(i) (1987). Rule 3(a).

THE NATURE OF THE PROCEEDINGS BELOW

This action is a condemnation proceeding in which the town of Cornish sought to acquire approximately 100 acres of defendants' property in fee simple and approximately 7 acres of defendants' property in esements for rights-of-way and access to the springs. The property was acquired as alleged protection zones above the Griffiths and Pearsons Springs which are located on defendants' property. Defendants appeal from decisions made

by the Court which materially and substantially affected the issues submitted to the Jury for Special Verdict.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

The issues presented on appeal include whether defendants have a right to a trial and determination of (1) the issues of public need and necessity, (2) the issues of the fair market value of the underlying mineral interests, (3) the issues of the right to produce evidence of the fair market value of access permits for hunting rights, (4) the issues of an award of appropriate costs and attorneys' fees for the plaintiff's abandonment of claims, and (5) the issues for award of claimed costs of trial.

STATEMENT OF RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions on appeal are:

1. Utah Code Ann. § 78-34-4. This Section states:

> **78-34-4. Conditions precedent to taking.**
>
> Before property can be taken it must appear:
>
> (1) That the use to which it is to be applied is a use authorized by law;
> (2) That the taking is necessary to such use;. . .
> (Emphasis added)

2. Utah Code Ann. § 78-34-9 (1987). This Section states:

> **78-34-9. Occupancy of premises pending action - Deposit paid into court - Procedure for payment of compensation.**

The plaintiff may move the court or a judge thereof, at any time after the commencement of suit, on notice to the defendant, if he is a resident of the state, or has appeared by attorney in the action, otherwise by serving a notice directed to him on the clerk of the court, for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action, including appeal, and to do such work thereon as may be required. . . .

3. Utah Code Ann. § 78-34-2. This Section states:

78-34-2. Estates and rights that may be taken.

The following is a classification of the estates and rights in lands subject to be taken for public use:

(1) A fee simple, when taken for public buildings or grounds or for permanent buildings, for reservoirs and dams and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter or other place for the reduction of ores, or for solar evaporation ponds and other facilities for the recovery of minerals in solution; provided that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground for such deposits.

(2) An easement, when taken for any other use.

(3) The right of entry upon, and occupation of lands, with the right to take therefrom such earth, gravel, stones, trees and timber as may be necessary for some public use.
(Emphasis added)

4. Utah Code Ann. § 78-34-10 (1987). This Section states:

78-34-10. Compensation and damages - How assessed.

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

(1) The value of the property sought to be condemned and all improvements thereon appertaining to the realty, and of each and every separate estate or interest therein; and if it consists of different parcels, the value of each parcel and of each estate or interest therein shall be separately assessed.

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

(3) If the property, though no part thereof is taken, will be damaged by the construction of the proposed improvement, the amount of such damages. . . .
(Emphasis added)

5. Utah Code Ann. § 78-34-16 (1987). This Section states:

78-34-16. Occupancy of premises pending action - Substitution of bond for deposit paid into court - Abandonment of action by condemner.

In the event that no order is entered by the court permitting payment of said deposit on account of the just compensation to be awarded in the proceeding within thirty (30) days following its deposit, the court may, on application of the condemning authority, permit the substitution f a bond in such amount and with such sureties as shall be determined and approved by the court. Condemner, whether a public or private body, may, at any time prior to final payment of compensation and damages awarded the defendant by the court or

> jury, abandon the proceedings and cause the action to be dismissed, without prejudice, provided, however, that as a condition of dismissal condemner first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemner, including attorney's fees. (Emphasis added)

6. Utah Constitution, Art. I, § 7. This constitutional provision states in relevant part:

> No person shall be deprived of life, liberty or property without due process of law.

7. Utah Constitution, Art. I, § 22. This constitutional provision states in relevant part:

> Private property shall not be taken or damaged for public use without just compensation.

8. Town of Cornish Ordinances 81-1 (R. 431), 83-1 (R. 435), 85-1 (R. 441).

STATEMENT OF THE CASE

This action is a proceeding in condemnation by Cornish Town to condemn approximately 100 acres of defendants' property for the purpose of creating protection zones above two springs located on defendants' property and to provide rights-of-way and access to the springs.

I. COURSE OF PROCEEDINGS AND DISPOSITION BEFORE THE LOWER COURT.

The Town of Cornish filed this action in July, 1986, seeking to condemn defendants' property in fee simple (Ordinance

85.4, Tr. at 1) through the statutory power of eminent domain, the property taken surrounds two springs in which both parties hereto have an interest. In its complaint (R. at 1), the Town of Cornish claimed a right to obtain defendants' property in fee simple. Plaintiff's Amended Complaint sought the same fee simple interests. (R. at 344) Defendants' Answer and Ninth Affirmative Defense and defendants' Third Cause of Action in Counterclaim allege the value of the land and consequential damages to the taking are valuable rights in the land that plaintiff sought to condemn. (R. at 31) The Town of Cornish filed a Motion for Immediate Occupancy of the property on July 29, 1986. (R. at 11) On October 8, 1986, following three days of hearing during which the plaintiff put on evidence of of a public need and necessity, the trial court refused to consider any evidence of defendants refutinging the prima facia claim of public need and necessity and entered an Order of Immediate Occupancy on December 16, 1986. (R. at 137) The Order of Occupancy contained no legal descriptions of the rights-of-way acquired and two subsequent motions to amend Complaint and a first amended complaint provided descriptions of the property to be acquired through eminent domain. The Order for Immediate Occupancy also included the claim of the plaintiff for the taking of the property in fee simple. Defendants objected to the Order as to the taking in fee simple. (R. at 69) In the proceedings for immediate occupancy, the specific question was asked if the plaintiff demanded fee simple including

all oil rights, and the response was that the purposes for which the property was condemned would be frustrated if the plaintiff could not obtain fee simple to the property including all mineral rights thereto. (R. at 469-470)

Thereafter, defendants filed a Motion for Partial Summary Judgment (R. at 416) to determine that the date of taking of property condemned was September, 1981 at the time the town ordinance 81-1 (R. 431) was enacted. That motion was denied. (R. at 579) Defendants prepared their defense and burden of proof of their claim of greater value for trial based upon the Complaint and Order of Immediate Occupancy in which plaintiff demanded and was exercising its claimed right to take the property in fee simple. (Tr. Vol. 1 at 15)

In presentation of plaintiff's case, the Trial Court made preliminary orders prior to the opening statements of the parties which prohibited defendants from putting on evidence refuting the claims of public need and necessity; and prohibited defendants from putting on any evidence concerning the fair market value of the mineral rights underlying the property taken. Defendants' offer of proof as to mineral rights (R. at 591) and R. at 602 and Tr. Vol. 1 at 15 and Vol. 11 at 10) During trial, the Court prohibited defendants from putting on evidence as to the fair market value of access permits for hunting; after trial the Court denied defendants' claim for attorney's fees and costs appropriate when plaintiff abandoned its claim for fee simple and

refused to allow defendants' claim to tax appropriate costs incurred in this proceeding.

The jury was instructed to make its findings without any consideration for the above referenced matters, and therefore the jury special verdict was inappropriate and incomplete.

Final Judgment on special jury verdict and a taking of perpetual easements and rights-of-way was entered by the District Court on May 13, 1988 (R. at 131) and Amended Final Judgment was entered June 13, 1988 (R. at 494).

II. STATEMENT OF FACTS

Plaintiff brought this action in condemnation pursuant to Statutory Power of Eminent Domain, claiming a public need and necessity to acquire lands belonging to the Defendants in fee simple for public use for the following purposes:

(1) Additional access easements to two separate springs situated on defendants' property in which plaintiff has a partial interest and to which plaintiff has had access easement since the inception of the town's interests in the springs.

(2) Sites for reservoirs and chlorinators.

(3) Extensive protection zones above each spring including approximately 50 acres of land in each protective zone. (R. at 1)

Defendants contested plaintiff's claim of public need and necessity for the acquisition of the land for the protection zones and contested issues relative to fair market value of the

property and the damages to be paid to the defendants for the property taken in condemnation. (R. at 31)

Upon filing Complaint, plaintiff filed a Motion for an Order of Immediate Occupancy. (R. at 11) At the hearing held October 8-12, 1986, the defendants raised the issues of whether or not the claimed public use was authorized by law, whether the taking was necessary to the use, whether the total of the land taken was necessary or should have included substantially more property, and whether the taking required a taking of title in fee simple, which included the claimed taking of all mineral rights to the property.

The evidence, as presented by Cornish Town, to these issues was (1) the town needed the protection zones to control nitrates in the water; (2) the town had received an opinion that nitrates in Cornish' water supply were there by reason of agricultural fertilization. (Hearing Tr. at 13 & 14). The town admitted that the report was the only source of information relied upon by the town and that the town had conducted no independent tests. (Hearing Tr. at 32)

The Department of Health for the State of Utah, by letter to Cornish Town advised the town that these springs used by Cornish for culinary water "may be relatively shallow sources of water and it may be impossible to develop them" (Exh. 2), yet the town admitted that there was no necessity to make additional tests to determine whether the springs could be made into a

culinary water systems (Tr. at 49). The town did not have, at the time of the hearing nor at the time of trial, any state approval of their plans for the construction of new water collection lines. (Hearing Tr. at 49 and at 109). During the course of the testimony, defendants raised issues of a public need and necessity to take fee simple title to a protection zones above the two springs when there was no showing that the source of the nitrates was the defendants' fertilization program (Hearing Tr. at 37), or, that control of a 1500 feet radius of property above the springs by the city would reduce the nitrates in the water (Hearing Tr. at 36).

There is no State requirement that a 1500 feet radius above the spring need be taken as a protection zone (Hearing Tr. at 36). The City Engineer estimated that only 1,090 feet need to be taken (R. at 775 & Hearing Tr. at 82). The amount of land to be taken was arbitrarily increased by the Mayor, not as a public necessity, but rather the Mayor stated the additional acreage was to "accommodate" Mr. Koller. (Hearing Tr. at 93).

Defendants raised the issues of public necessity of spending public funds, as it was arbitrary and a waste of public funds to purchase protection zones where there was no evidence that the acquisition of the protection zones would affect the nitrate content of the water. (Hearing Tr. at 72 and following).

Defendants challenged the issue of the public necessity to take the property in fee simple title. Cornish admitted that

the town had entered into an agreement with an adjoining landowner, who owned property within the 1500 foot radius above the Griffiths spring, (Exhibit 14) where the town executed a 20-year agreement in which the land owner agreed not to fertilize his property. This agreement was acceptable to the town (Hearing Tr. at) and the State of Utah (Hearing Tr. at 129), yet the town sought to take fee simple title to defendants' property without ever offering to defendants such an arrangement.

At the conclusion of the plaintiff's testimony, defendants moved to dismiss upon the following grounds: (1) the town did not show with any degree of certainty that it had a public need and necessity for the protection zones; (2) There was no showing of public necessity to take fee simple title to the land for nitrates; (3) The size of the zone was increased arbitrarily from 1,090 radius feet above the spring to 1,500 feet radius; and (4) The town failed to show any public need for the property taken when other alternative sites with substantially greater potential to develop water for the town were available. The Trial Court denied the motion stating:

> "As to the site and the amount included in the site is not for the courts to decide. That's for the condemnor to decide as long as they act reasonably and in good faith." (Hearing Tr. at 981)

Defendants proceeded to introduce evidence to the Court concerning the lack of necessity and good faith:

(1) The State has not determined the amount of land necessary to protect this water supply (Hearing Tr. at 110) nor whether the water claimed by Cornish is ground water or surface water (surface water requires a greater treatment, and, therefore, greater expenditure of public funds). (Hearing Tr. at 128)

(2) The nitrate level in the Cornish water made redevelopment of the springs a questionable investment. (Hearing Tr. at 150).

(3) Cornish should have the area examined in an attempt to determine the recharge area of the springs so that the areas could be controlled (Hearing Tr. at 157), and a decision made as to how much land for a protection zone was necessary. (Hearing Tr. at 166).

(4) The soils were poor aquifers (Hearing Tr. at 29) subject to contamination from the surface (Hearing Tr. at 210), the probable source of nitrates was agriculture (Hearing Tr. at 211), but that additional tests had to be made in order to determine the source of the nitrates in the water supply. (Hearing Tr. at 212).

(5) The source of the nitrates in the water would have to be determined in order to designate the amount of the land necessary to provide protection to the springs. (Hearing Tr. at 214).

(6) No evidence was provided to show that the condemnation of the approximate 50 acres above each spring was going to

reduce the nitrates in the soil, nor reduce the nitrates in the springs. (Hearing Tr. at 250).

(7) Core samples were drilled and dye tests conducted in the area sought to be condemned. It was determined the recharge area for the Griffiths Spring is 200 acres and the recharge area for the Pearson Spring is 650 acres. (Hearing Tr. at 328).

(8) Dye tests determine that the source of the Cornish water was in fact surface water. (Hearing Tr. at 334). Dye placed outside of the protection zones indicated that the area sought to be condemned was not the only recharge area of the springs. The recharge area of the springs could not be reduced into a smaller area from the 200 acres for Griffiths Spring and 650 acres for Pearson Springs. (Hearing Tr. at 350)

(9) The major source of water flowing into the Pearson Spring was from snow drifts outside of the area condemned by Cornish and that only a very small quantity of water originated within the protection zone, and, therefore, Cornish' attempt to condemn lands did not encompass the point of origination of the water, nor the point of origination of the claimed contamination. (Hearing Tr. at 369)

(10) The nitrogen in the soil is fixed by algae. The amount of nitrogen added to the soil by the algae is more than twice the amount applied in fertilizer. The amount of fertilizer

put on the land by defendants was less than the total that the crop consumed. (Hearing Tr. at 373)

(11) Letting the land lay dormant will not cause a reduction in nitrates, and, therefore, the taking of the land by Cornish in protection zones will not result in upgrading the city's water supply (Hearing Tr. at 378).

(12) If the condemnation proceeds and the town takes the land out of production, nitrate levels will not decrease as the soil is a large reservoir of potential nitrates from natural organic sources. (Hearing Tr. at 408).

Defendants offered Cornish the use of pre-existing roads to the springs in lieu of the condemnation proceedings on farmland. (Tr. 248). Cornish rejected the offer and condemned farmland for new roads. Defendants testified that if the city did not need to take fee title to the land, defendant offered to withhold portions of his land from fertilization. (Hearing Tr. at 266).

Following the conclusion of the evidence the Trial Court indicated in its decision as follows:

> This court is not to inquire into the use or necessity or expediency or the appropriateness of the particular property, and the court quotes that as a quote of case and re-quotes it again in the Fuller case.
>
> They have also stated in the Fuller case that in view of the general grant of authority carries no limitation by implication. In either case the necessity is for the condemnor and is not for the courts to decide, and the decision of the condemnor is final as long as it acts reasonably and in good faith. (Hearing Tr. at 482)

The Trial Court denied all of the defendants' motions and requests. In doing so, the Court abrogated its duty in stating that:

> They have reviewed and selected this method and I do not find from the evidence that they acted unreasonably or that they acted in bad faith in doing so. I don't pass on their judgment as to its appropriateness because that is not within the prerogative of this court to do so. (Hearing Tr. at 484)

After the commencement of the trial and the selection of the jury had been completed and before opening statements were made by the parties, defendants made proffers of proof to the Court that they intended to request that the jury make a determination of the fair market value of the underlying minerals of the property. (Tr. Vol. 1 at 1) The minerals are zeolite, that has an immediate market value. In addition, there was a ready market for the mineral (Tr. Vol. 1 at 17), and that defendants had prepared a portion of their case with extensive legal costs and the preparation of expert witnesses to present testimony as to the fair market value of the underlying minerals. Defendants made proffer that the minerals could not be extracted without removal of the overburden, being the surface soil. (Tr. Vol. 1 at 8) Plaintiff then moved to amend their complaint to abandon their claim for a taking of the fee simple interest to the property and to make claim for a perpetual easement only. (Tr. Vol. 1 at 7) The Court granted the motion to amend complaint and denied defendants' rights to put on evidence as to the fair market value

of the underlying mineral interest. (Tr. Vol. 1 at 15) The Court stated: "I don't see any of us will in our lifetime ever see any bulldozer or anything out there . . . I'll believe it when I see it." (Tr. Vol. 111 at 10) Without considering any evidence, the Court indicated that the basis for its ruling was its own opnion that there was no mineral value in defendants' property. That decision forced defendants to carry the burden of proof as to claimed interests for perpetual easements that were never raised until the date of trial.

Defendants then petitioned that the Court hear evidence as to the claims of public need and necessity of the property being condemned. (Tr. Vol. 1 at 10) The Court denied that motion saying that all issues as to public need and necessity were presented by the plaintiff in a prima facie case, and that the Court had no right to determine whether there was a public need and necessity, and therefore denied defendants' request for any findings or determination of the issues of public need and necessity. (Tr. Vol. 1 at 10)

During the trial, defendants attempted to put on evidence as to the fair market value of the retail cost of access permits for hunting purposes for the deer herd that exists on defendants' property. The Court denied defendants the right to put on that evidence, stating that since defendants had not sold any hunting access permits prior to the date of taking, they could not claim that hunting access permits would increase the

value of highest and best use of the property and would increase the fair market value of the property and the severance damages claimed. (Tr. Vol. 1 at 80)

The Jury awarded Judgment on Special Verdict of $59,670 (R. at 640) and Amended Judgment (R. at 853).

Subsequent to trial, defendants petitioned the Court for an award attorney's fees, expenses and costs for the abandonment of the claims by plaintiff for fee simple interest to the property. The attorneys' fees and costs were incurred in preparing evidence as to the fair market value of the mineral interests in the property, the Court denied those claims. (R. at 859)

SUMMARY OF ARGUMENT

The issues of public need and necessity for the creation of protective zones by taking defendants' land through condemnation proceedings should be determined by the jury as part of the proceedings at trial.[1/]

The date of taking for determination of fair market value of the property was the date of the town's regulatory taking by Ordinance 81-1 when the town prohibited any farming or use

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1/ State Road Commn. v. Friberg, 487 P.2d 821 (Utah, 1984).

of the property within a two-mile radius of the town's water supply.[2/]

From the commencement of this action, the town intended to claim fee simple title to the property which included a claim for mineral rights. The mineral interests in the property cannot be mined without removal of the soil overburden. Removal of the mineral interests would not support the surface right. The defendants have a right to the fair market value of the mineral rights condemned by the town.[3/]

The town was granted leave to amend its complaint to abandon its claim for fee simple title to the property and to claim a perpetual easement to the property. The abandonment and dismissal of that claim gives rise to an award to defendants of all attorney's fees, expenses and costs incurred in preparing their claims for greater value of the claims for condemnation of fee simple interests which included the mineral rights to the land.[4/]

The value of access permits for hunting of the deer herd on defendants' property was proper evidence of the value of

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2/ Nollan v. California Coastal Commn., 97 L.Ed.2d 677 (U.S. Sup. Ct. June, 1987) and First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 96 L.Ed.2d 250 (U.S. Sup.Ct. June, 1987)

3/ Wm. E. Russell Coal Co. v. Board of County Commissioners of Boulder County, 270 P.2d 772 (Colo., 1954)

4/ Merced Irrigation Dist. v. Woolstenhulme, 483 P.2d 1 (Cal., 1971).

the property for its highest and best use, and that evidence should have been presented as a prospective business use of the property.[5/]

The Court failed to include as proper costs to be awarded to defendants the costs of transcripts and the costs of extraordinary exhibits as required in a condemnation proceeding.[6/]

ARGUMENT

I

WHETHER THE COURT ERRED IN ITS INTERPRETATION OF THE LAW WITH REGARD TO THE ISSUE OF PUBLIC NEED AND DETERMINATION OF NECESSITY.

1. The standard of review

A. As to issues of law, the reviewing court should review the decisions of Court in the light most favorable to defendants as to issues of public need and necessity since the decision of the trial court was made in the nature of a granting of summary judgment.

B. With regards to the issues of fact, this Court should interpret those facts in the light most favorable to defendants since the trial court refused to consider defendants' evidence in determining public need and necessity.

5/ State by and through Road Commission v. Larkin, 495 P.2d 817 (Utah, 1972).

6/ Frampton v. Wilson, 605 P.2d 771 (1980).

The standard is whether, reviewing the record as a whole and drawing all reasonable inferences in favor of defendants, is plaintiff entitled to a judgment of public need and necessity as a matter of law. National American Life Ins. Co. v. Bayou Country Club, Inc., 403 P.2d 26 (Utah, 1965).

The Trial Court abrogated its responsibility in a condemnation proceeding when it stated that the court would not substitute its judgment for that of the town as to the determination of public need and necessity. The town had reviewed and selected the method chosen for the improvement of its water supply and the court did not find from the plaintiff's evidence that they acted unreasonably, in bad faith or arbitrarily.

2. A determination at law of public need and necessity.

Two Utah cases are particularly pertinent to these issues. The first is Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977) where this Court said as follows:

> The power of eminent domain is not to be exercised thoughtlessly or arbitrarily and the courts possess full authority to determine the proper limit of the power to prevent abuses in its exercise and litigants should and do have great latitude in conferring the positive functions upon the court as they clearly did in this instance. The question of necessity of the taking is the functional perrogative of the judicial system and that principle of law is stated in Nichols on eminent domain.
>
> In every case, therefore, there is a judicial question whether the taking is of such a nature that it is or may be founded on public necessity.

The second is the case of Utah State Road Commission v. Friberg et al., 687 P.2d 821 (Utah 1984) where this Court said:

> We turn first to the issue of the legal effect of the order of immediate occupancy. In a condemnation proceeding the state has the burden of coming forth with the evidence of, and the burden or persuasion to establish his right to condemn. The state must prove that the taking of the property is necessary and that the property will be dedicated to a public use. (With citations).

In Friberg the State contended that the right to condemn was fixed when the order of immediate occupancy is entered. The Supreme Court said:

> If the condemnor's authority to condemn is challenged a prima facia showing of the right to condemn must be made to support and order of immediately occupancy. However, a prima facia showing of the authority is not a final determination of authority.
>
> An order of immediate occupancy is an order entered pendente lite and only authorizes the state to take immediate possession until a final adjudication of the merits.
>
> The State's right to condemn if challenged can finally be determined only after a trial on the merits not at a hearing on the motion for immediate occupancy.

In the Ramoselli case, supra, the Trial Court stated as follows:

> At the conclusion of the trial the Court made its findings which generally stated that any use of the premises was uncertain indefinite, speculative and not within the reasonably foreseeable future. Based thereon it concluded that the plaintiff had failed in its burden of proving need or public necessity and that the attempted condemnation was clear abusive discretion.

Defendants contend that the trial court refused to consider there has never been a determination made by the State of Utah that the springs were ground water or surface water. The

size of the protection zone necessary to meet the supposed needs of the town was never determined based on the town's claims that the protection zones were necessary to control nitrates. Finally, the Court did not determine whether the taking of fee simple title was necessary.

The Trial Court abrogated its function as a court when it said as follows:

> The degree of necessity or the extent to which the property will advance the public purpose the courts have nothing to do with. That is not the role of the court. When the use is public the necessity or expediency of the appropriation of the particular property is not subject of judicial cognizance.
>
> This Court is not to inquire into the use or necessity or expediency or the appropriateness of particular property and the court quotes that as a court of a case and re-quotes it again in the Fuller case. (Tr. at 454).
>
> And further,
>
> That there is sufficient testimony to show the necessity of something being done by Cornish to do something to their water supply so they can meet the requirements of the state as far as adequate and pure water supply. (Tr. at 460)

The court granted the order of immediate occupancy in violation of the law as set forth in State v. Friberg, supra, page 832 where the court held that the State must prove that the taking of that the property is necessary and the property will be dedicated to public use. In Ramoselli, supra, page 143, the court held that the question of necessity of the taking is a functional prerogative of the judicial system. In Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684, 687 (Utah, 1979), the court held:

> The duty of determining the necessity of a proposed taking, the necessity must be established by evidence or the proceeding fails. Necessity does not signify impossibility of constructing the improvement for which the power has been granted without the taking of the

> land in question. It merely requires the land be reasonably suitable and useful for the improvement.

Utah Department of Transportation v. Fuller, 603 P.2d 814 (1979) holds that the order of immediate occupancy issued by the Trail Court should be based upon evidence properly before the court and where such an order is supported by ample evidence. In the Gibbons case and the Fuller case defendants challenged the selection of the site by the condemning authority suggesting that other sites were more appropriate. The court rejected the suggestions indicating that if there was ample evidence to support the order and there was a lack of an arbitrary decision made by the condemning authority, the order will stand. In this case, as in the Ramoselli case, supra, defendants are not saying another site is better, they are saying plaintiff cannot show the taking will benefit the public because there was no showing from the evidence introduced that the taking would in any way improve the public water supply of the town of Cornish.

The evidence introduced at the time of the Order of Immediate Occupancy indicated that Cornish did not have approved plans and specifications for the improvement of their water system (Hearing Tr. at 109), and, it was unknown whether or not the development was a development of ground water or surface water. If the springs were surface water, no protection zone would be required. (Hearing Tr. at 104) If the springs were ground water, then the issue of the size of the protection zone to accomplish

the purpose of protecting the water supply would have to be determined. (Hearing Tr. at 214)

The flow of the springs was unknown by Cornish after the development, and, therefore, the economic expenditure versus the public good was unknown by Cornish. It was submitted by defendants throughout the entire hearing that these expenditures of the money were not in the best interest of the public, taking into consideration the costs of acquisition of the land. (Hearing Tr. at 101). The Trial Court's finding that there was sufficient testimony to show the necessity of something being done by Cornish, to do something to their water supply simply shows the court's inability to articulate a necessity to do a specific act to achieve a specific public purpose.

That criteria fails to meet the criteria established by the Supreme Court in the case of Ramoselli, supra, where the Trail Court reviewed the law as cited before herein and stated:

> Briefly stated the evidence at trial was that no defined plans had been adopted or approved, that no time frame of use within the reasonably foreseeable future had been determined, despite the fact that a voluntary acquisition of nearby property for public use some six years prior had not as yet been placed to its intended purpose, and that no funds had been requested, budgeted, appropriated or were presently in existence to place the property in question to use.

The plaintiff's failures to determine whether or not the water in question is surface or ground water, what treatment will be necessary and the cost of that treatment, the flows which will be anticipated from the improved springs areas versus the

cost to the public parallel Salt Lake counties efforts in the Ramoselli case.

The Trial Court abrogated its role and function as a court by failing to consider evidence before it of the lack of public need and necessity. Having therefore raised the issue of necessity, defendants' evidence amply proved that there was in fact no necessity in the taking of the land without a determination of the issues set forth herein.

II

THE TRIAL COURT ERRED IN REFUSING TO ALLOW DEFENDANTS TO ASSERT THE DEFENSE AND INTRODUCE TESTIMONY AS TO THE CLAIM OF PUBLIC NEED AND NECESSITY AT THE TIME OF TRIAL.

This Court has held in Utah State Road Commission v. Friberg, supra, that:

> An order of immediate occupancy is entered pendent light and only authorizes state to take immediate possession until a final adjudication of the merits.

The Trial Court erred in failing to submit the issue of necessity to the jury upon the trial of the matter. As stated in the Friberg case at page 833:

> The State's right to condemn, if challenged, can finally be determined only after a trial on the merits not at a hearing on the motion for immediate occupancy.

State Road Commn. v. Denver and Rio Grande Railroad, 8 Utah 2d 236, 332 P.2d 926 (1958).

The court in the Friberg case further found that the Friebergs' express reservation of their right to contest the

power to condemn in the plenary proceedings is not prohibited by the rules of res adjudicata. Just as the right was reserved by the Friebergs, defendants in the instant case reserve the right. (Tr. Vol. 1 at 10 and at 91-98) where the issue of necessity was specifically raised by the defendants. Defendants were denied the right to put the issue before the jury and made an offer of proof to the court relative to such issues. (Tr. Vol. 1 at 92). The only issue submitted by the Court to the jury was the issue of the value of the property taken.

Defendants were entitled to have the jury hear evidence and determine the issue of public need and necessity as such issues related to the question of good faith, waste of public funds, public need and necessity, abuse of discretion and use of the premises for uncertain indefinite and speculative reasons, and to determine the size of protective zones and the problems with the determination that the springs are surface water or ground water.

III

WHETHER PLAINTIFF IS LIABLE FOR TAKING OF DEFENDANTS' PROPERTY BY RESTRICTIVE ORDINANCE.

Defendants have profitably dry farmed their property. For many years, applying herbicides, pesticides and fertilizers to their property to obtain maximum yields from their farming practices.

On September 24, 1981, plaintiff enacted Ordinance No. 81-1, restricting the use of all herbicides, pesticides, fertilizers, grazing and human habitation on property within a two-mile radius above any water source used by the town. The town was using two springs located on the Kollers' property and a well located just below the Kollers' property as water sources.

Passage of Town Ordinance No. 81-1 prohibited defendants from any beneficial or economically feasible use of their property located within a two-mile radius of the town's water sources. Approximately 85% of defendants' property lies within the described two-mile radius. Ordinance No. 81-1 decreased the value of defendants' property by 85-90%. (R. 486)

On April 23, 1983, plaintiff enacted Ordinance No. 83-1 which was identical to Ordinance No. 81-1 except that it added additional police enforcement authority.

On April 3, 1985, plaintiff enacted Ordinance No. 85-1, which applied the restrictions of Ordinances No. 81-1 and 83-1 to property within a one-mile radius above all sources of the town's water supply. Approximately one-half of defendants' total property lies within a one-mile radius of the sources of the town's water supply.

Passage of Ordinance No. 85-1 perpetuated the denial of all beneficial and economically viable use of 50% of defendants' property. It also perpetuated the 85 to 90% decrease in value of defendants' property.

On July 29, 1986, plaintiff served upon defendants a Summons and Complaint pursuant to powers of eminent domain, condemning in fee simple approximately 100 acres of defendants' property for a protective zone above the springs which were sources of part of the town's water supply and for access roads thereto.

On August 1, 1987, plaintiff postponed the enforcement of Ordinance No. 85-1, ostensibly for the reason that the condemnation proceeding was pending and resolution of this action would give plaintiff the right to impose or abandon the ordinance.

In June, 1988, plaintiff passed Ordinance 88-1, repealing Ordinance 85-1, "in its entirety."

In each of the ordinances described above, defendants were restricted from using fertilizers, pesticides, and herbicides on their property, from keeping or grazing livestock on their property, and from using their property for human habitation. If defendants were prohibited from the right to use herbicides and pesticides on their soil, it becomes infested with weeds and cannot be used to cultivate crops. Without the right for application of fertilizers, the property quickly becomes depleted and will not yield a profitable crop. The only remaining beneficial use of the property would be grazing of livestock, and the ordinance prohibited that use. Plaintiff has been prohibited by those ordinances from all beneficial or economically

viable use of their property and the ordinances have materially decreased the value of the property since September 24, 1981.

I. UNDER STATE LAW, ORDINANCE 81-1 ENTITLES DEFENDANTS TO COMPENSATION AS OF THE DATE OF ENACTMENT.

State law requires assessment of damages for just compensation in eminent domain proceedings to be assessed from a specific date of taking, (Utah Code Ann. § 78-34-11, 87-88). The date of taking should be determined as the effective date of the restrictive ordinance, being September, 1981.

A. To Value Defendants' Property on the Date Process Was Served Is to Deny Just Compensation.

The Utah Supreme Court held in 1984 that Utah Code Ann. § 78-34-11[7/] creates a rebuttable presumption that the date for determining valuation shall be the date of service of process. Utah State Road Commission v. Friberg, 687 P.2d 821, 831 (Utah, 1984). That presumption is rebutted "by a showing that a valuation as of the date of service of summons would result in an award that would not provide 'just compensation' to the landowner. . . ." Id. at 832.

7/ Section 78-34-11 provides as follows:

> When right to damages deemed to have accrued. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected, in all cases where such damages are allowed, as provided in the next preceding section.

In Friberg, process was served seven years before the state proceeded to a final decree. In the intervening years, the Friberg property appreciated in value. The Supreme Court held that the Fribergs would not be justly compensated by valuing their property as of the date of service because "the difference in valuation of defendants' property between the date of service of summons and the date when the right to condemn was settled is evident and significant." Id. at 835.

The Friberg case establishes a two-pronged test to rebut the presumption that damages accrue at service of summons: (1) the unfairness of valuing the property at service of process must be evident, and (2) the difference in value must not be insignificant. Id. at 831.

B. It Is Unfair for the Plaintiff to Value the Koller Property at a Date When the Property Has Lost All Value by Reason of the Plaintiff's Restrictive Ordinances.

In this case, as in Friberg, the landowner can only be justly compensated if his property is valued on the actual date of taking rather than on the date of service of process. On September 24, 1981, the plaintiff's Ordinance 81-1 precluded any reasonable use of the Kollers' property and caused a complete loss of value. The plaintiff first devalued the Kollers' property by regulatory restrictions and then five years later commenced this legal action. The appraisers testified and by affidavit testified that the value of the property in 1981 was

significantly greater than the value of the property in 1988 (R. 486). It is manifestly unfair to allow plaintiff to value the property at a date five years after the plaintiff effected a regulatory taking of the property. To use the date of service of process, July 29, 1986, is to deny defendants just compensation.

C. Substantial Interference that Materially Lessens Value Constitutes a Compensable Taking.

Article 1, § 22 of the Utah Constitution provides that private property shall not be taken or damaged for public use without just compensation. In Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 P. 849, 852 (1904), the Utah Supreme Court ruled that

> "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a taking, in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed."

The court required the defendant railroad in Stockdale to officially condemn the landowner's property before it could subject the property to a proposed switchtrack which would shake the landowner's house and annoy him with smoke and cinders. The Town Ordinance 81-1 destroys the property's value and destroys the Kollers' right to use and enjoy their property in the farm or ranch operations for which it has been used for many years.

D. Threatened Public Damage to Private Property Is Compensable.

In State Road Commn. v. District Court, 78 P.2d 502 (Utah 1938), the State Road Commission was about to build a viaduct that would deprive the landowner of convenient access to his property. The proposed viaduct would also darken the street in front of the landowner's property and deprive him of light, air and view. The Supreme Court held that Article 1 § 22 of the Utah Constitution had been carefully worded to include compensation for "damage" to property as well as "taking" of property; that wording was designed to "protect the damaged property owner equally with the property owner whose land was physically entered upon." Id. at 508.

The Court reaffirmed all the principles enunciated in Stockdale and held that "a party, whose property is about to be specially damaged in any substantial degree for public use, has the same rights and is given the same remedies for the protection of his property from the threatened injury as would be accorded him if his property were actually taken and appropriated for such use." Id. at 506.

E. Depriving an Owner of Beneficial Use of Property Constitutes a Compensable Taking.

As recently as 1981, the Utah Supreme Court reaffirmed its position that deprivation of beneficial use is the standard by which to measure a taking. In Sweetwater Properties, SBC v. Town of Alta, 622 P.2d 1178, 1182 (Utah 1981) the court held that a policy declaration was not a taking because it did not deprive

the owner of the property's beneficial use. It follows that if the governmental action such as the town's restrictive ordinances, had deprived the owner of beneficial use, it would have constituted a taking.

II. UNDER FEDERAL LAW, ORDINANCE 81-1 ENTITLES DEFENDANTS TO COMPENSATION AS OF THE DATE OF ENACTMENT

The Fourteenth Amendment to the United States Constitution makes the Fifth Amendment applicable to the States. In 1987, the United States Supreme Court issued two decisions on the Fifth Amendment Takings Clause. Both decisions are directly applicable to the case before this Court.

A. Ordinance 81-1 Takes Defendants' Property Because It Denies Any Economically Viable Use of Their Land.

In Nollan v. California Coastal Commission, 97 L.Ed.2d 677, 687 (June 26, 1987) (copy of case, R. 447), the Supreme Court reiterated the standard for a taking under the United States Constitution. A land use regulation does not effect a taking if it (1) substantially advances legitimate state interests and (2) does not deny an owner economically viable use of his land. Regardless of whether it advances state interests, Ordinance 81-1 effects a taking because it denies defendants any economically viable use of their land.

In Nollan, the Court also emphasized that the Takings Clause is designed to bar government entities from forcing some

people alone to bear public burdens that should be borne by the public as a whole. Id. at 688 fn.4.

B. Defendants Are Entitled to Damages for the Period 1981 to the Present.

The United States Supreme Court has decided the very question that is before this Court. This Court must decide whether a landowner may recover damages from the time that the regulation constituted a taking of his property. The Supreme Court answered that question on June 9, 1987 in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 96 L.Ed.2d 250, 258 (June 9, 1982) (copy of case, R. 464). The Court held that the Fifth and Fourteenth Amendments required compensation for the period between the time the regulation took effect and the time the taking was officially acknowledged.

The Lutheran Church owned a campground with bunkhouses and other buildings along a creek in the Angeles National Forest. Following a forest fire, a storm overflowed the banks of the creek. flooded the campground and destroyed the buildings. Los Angeles County responded to the flood by enacting Interim Ordinance No. 11,855. The ordinance restricted all building within the flood protection area, which included part of the campground.

The Lutheran Church argued that Ordinance 11,855 denied it all use of its campground. The Supreme Court, considering that argument, quoted the rule that property may be regulated to a certain extent, but if regulation goes too far, it will be

recognized as a taking even though there are no formal proceedings. Id. at 264-65. The Court then held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." Id. at 268.

The Court recognized the far-reaching consequences of its decision. It wrote that its holding would lessen the freedom and flexibility of municipalities in enacting land-use-regulations, but that such consequences "necessarily flow from any decision upholding a claim of constitutional right." Id. Defendants' claim of Constitutional right requires that the general public pay the price of watershed protection by valuing the Kollers property on the day before Cornish passed an ordinance stripping the property of all value. A determination of the 1981 date of taking would substantially increase the fair market value of the property. Defendants were prohibited by order of the Court from presenting any evidence as to the ordinances or the fair market value of the property prior to July 26, 1986, the date of service of summons in this proceeding.

IV

WHETHER MINERAL RIGHTS ARE COMPENSABLE AS PART OF JUST COMPENSATION

Plaintiff's Complaint, the Amended Complaint, the Motion for Immediate Occupancy and the proceeding and hearing for

immediate occupancy all required of defendants a taking of their property in fee simple. Even when plaintiff was specifically asked about a taking of all mineral rights prior to the Summons and Complaint and in the hearing for immediate occupancy, plaintiff responded, emphatically, that the taking in fee simple was absolutely necessary and that the taking in fee simple included all mineral rights to the property. The town's Ordinance 85-4 authorizing condemnation required a taking in fee simple.

The Order of Immediate Occupancy to the property required the taking the property in fee simple title including all mineral rights. Plaintiff having tendered to the Court 75% of the condemning authority's appraised valuation of the property, left defendants with the only issue for consideration, defendants' "claim for greater compensation." (Section 78-34-9, U.C., 1987-88).

Defendants prepared their defense and the evidence and expert testimony to sustain their burden of proof for greater compensation based upon the final amended complaint and Order of Occupancy each of which required the valuation of underlying mineral interests as part of the claim for title to the property in fee simple.

After empanelment of the Jury and prior to opening statements defendants, as the party with the burden of proof, reviewed with the Court their intent to present to the jury in opening statement the issue of valuation of mineral rights. (Tr.

Vol. 1 at 1) Plaintiff immediately upon oral petition moved to amend its Complaint for the second time, to abandon and waive its claim for title to the property in fee simple and to make a new claim for condemnation pursuant to Section 78-34-2(1), U.C., 1987-88. (Tr. Vol. 1 at 7)

> "The following is a classification of the estates and rights in lands subject to be taken for public use:
> (1) A fee simple when taken for . . . reservoirs and dams . . .; provided that where surface ground is underlaid with minerals, coal or other deposits sufficiently valuable to justify extraction, only a perpetual easement may be taken over the surface ground over such deposits.
> (2) An easement, when taken for any other purpose . . ."

Plaintiff thereafter claimed a right to a "perpetual easement" only. The trial court allowed the abandonment of claim for fee simple interest in the property and permitted the amendment of a claim for perpetual easement, over defendants' objections and prohibited defendants from presenting to the jury the issue of valuation of mineral rights. (Tr. Vol. 1 at 77 and Vol. II at 11) The trial court further overruled defendants' objections that pursuant to statute, plaintiff had amended its claim to an easement interest only and not a perpetual easement over the surface ground over such deposits.

In State Dept. of Highways v. Wooley, 696 P.2d 828 (Colo. 1984). The Colorado court held that the condemning authority must declare in its petition the nature of the taking

so that the landowner can accurately evaluate the damages to be incurred.

> "The purpose of a taking of land and water rights by a city for water supply purposes fixes the extent of the rights reasonably necessary to exercise the title acquired. The government must commit itself as to what is taken and as to what remains untaken, and that which remains untaken continues vested in the owner." See also 30 C.J.S. **Eminent Domain** § 451.

It has been held that where land is taken to protect a water supply from pollution, the condemnor is entitled to exclusive possession of the land. Divided control over the land is incompatible with the taking of lands for a water supply. Barnes v. Peck, 187 N.E. 176, (Mass., 1933); Flagg v. Concord, 111 N.E. 369 (Mass., 1916).

The taking of fee title is a taking of the entire title and necessarily includes all lesser estates including underlying minerals. 30 C.J.S. **Eminent Domain** § 450. Meriwether v. Gulf Oil Corp., 298 P.2d 758 (Okla. 1956). The fee simple title to the land acquired included all interests in the property and the land owner did not retain mineral rights in the property.

In Springfield v. City of Perry, 358 P.2d 846 (Okla., 1961), the city had condemned land for water works purposes. The Court held that condemnation proceedings resulted in acquisition of fee simple title to land including the mineral estate in view of the language of the pleadings. In Kansas Power & Light Co. v. Richie, 722 P.2d 1120 (Kan. App. 1986), the court held that if the intended use excludes rights of the underlying interest

holder, then value of mineral rights must be considered in determining just compensation. In Wymo Fuels, Inc. v. Edwards, 723 P.2d 1230 (Wyo., 1986), the court held that the subservient estate retained only such incidents of ownership as were not inconsistent with plaintiff's dominent estate. Since plaintiff contends that the mining of minerals wold be inconsistent with their right to a protective zone, plaintiff must pay for the mineral interests underlying those protective zones.

In Wm. E. Russell Coal Co. v. Board of County Commissioners of Boulder County, 270 P.2d 772 (Colo. 1954), the land owner claimed coal interest underlying the property and that removal of those mineral interests would impair support of the surface easement acquired for a highway. Therefore, the land owner should be compensated for that underlying mineral interest. The Court held that the jury should determine the amount of damage resulting to a land owner of mineral interests and the jury could not avoid determining the value of those mineral interests because the municipality had determined that the servitude estate was freed from liability because of a claim for surface rights only.

IV

WHETHER ABANDONMENT AT TRIAL OF PLAINTIFF'S CLAIM FOR FEE SIMPLE GIVES RISE TO OBLIGATION TO PAY DEFENDANTS' ATTORNEYS FEES, EXPENSES AND COSTS.

State law specifically provides for an award of all damages, costs and attorney's fees to defendants as follows:

> Condemnor . . . may, at any time prior to final payment . . . abandon the proceedings and cause the action to be dismissed without prejudice, provided, however, that as a condition of dismissal condemner first compensate condemnee for all damages he has sustained and also reimburse him in full for all reasonable and necessary expenses actually incurred by condemnee because of the filing of the action by condemner, including attorney's fees.
> (78-34-16, U.C., 1988-89)

In April, 1984, by letter to Cornish Town, the town was advised by its engineer that the State Division of Health did not require that land be acquired as protection zone or that the land be owned by Cornish. (R. at 768)

On March 17, 1986, Cornish Town wrote to Mr. Koller offering to purchase the property claimed to be necessary for protection of the town's water supply.

On March 22, 1986, Mr. Koller responded to the inquiry asking the town to indicate the exact location and size of their proposed protection zone. And, specifically, Mr. Koller asked "How much control do you need over the areas in question? Do you need the oil and mineral rights?" (R. at 778)

On June 25, 1986, the town made no written response to the questions asked except an unsigned letter continuing an offer to purchase Mr. Koller's property. (R. at 782)

On July 5, Mr. Koller responded in writing requesting the answers to his questions by asking review the matters with the town and its appraisers. He further advised the town of the issues raised in the Federal Farm Land Protection Act that

specifically deals with the interest in lands that are being acquired. (R. at 783)

On July 14, 1986, Cornish Town made a "final offer to purchase" and stated "(7) In order for Cornish to maintain effective control over the spring protection zones, it is imperative that it obtain all rights to the land shown in the surveys." (Emphasis added) The letter further referred to the Utah Geological & Mineral Survey which indicates the town was taking all rights including any underlying mineral deposits of whatever nature. (R. at 784)

By Ordinance 85-4, the town authorized condemnation proceedings to acquire defendants' property in fee simple.

In August, 1986, Cornish Town filed its Complaint for acquisition of this property by Cornish Town. In its Complaint and its First Amended Complaint in Condemnation, paragraph 7 alleges "The Plaintiff seeks to acquire, in fee simple, all property and property rights of the defendants in the real property described in Exhibit "A." (Emphasis added)

On numerous occasions prior to hearing of Motion for Immediate Occupancy, the defendants requested that plaintiff recede from its demand for the taking of fee simple title to the property and on each occasion the request was denied.

At the hearing for motion for immediate occupancy, the town was specifically asked on the record if they demanded fee simple to the land and the mineral rights (Hearing Tr. 469 &

Trial Tr. 787). the specific response was that the demand in condemnation was for all rights to the land, including mineral rights, otherwise the town would be frustrated in establishing its protection zones.

> "Mr. Preston: One other issue, and I don't know whether that's been addressed by the Court. Does the fee simple taking here exclude or include oil rights?
> "The Court: I don't know what their - I'd have to ---
> "Mr. Burnett: Fee simple is fee simple, and the whole purpose of the protection zones would be frustrated by having an oil rig on there.
> "The Court: Well, what does your resolution provide? Are you looking for surface rights? You're looking for fee simple surface rights, I know that.
> "Mr. Burnett: We are, your honor and I'd have to talk to our engineer and confirm that, because at this point as a lay person I'd be a little concerned about the purpose of the protection zone being frustrated by giving away some sub-surface rights which would interfere with the whole purpose of the protection zone. I think that's an issue that could be addressed later on and not in an order of immediate occupancy.

The Order of Immediate Occupancy provided for the taking of the land in fee simple.

Defendants were then left with no further declaration or clarification as to the intent of the town other than the intent to demand and to acquire by condemnation the property in fee simple including all mineral rights. Defendants were then forced to prepare their claim for just compensation based upon the demands made by the town of Cornish for fee simple title to the property and for all rights and interests in the property including mineral rights.

The laws of the State provide:

> "The rights of just compensation for the land so taken or damaged shall vest in the parties entitled thereto, and said compensation shall be ascertained and awarded as provided in section 78-34-10 . . ." (78-34-9, U.C., '1988-89)
>
> Section 79-8-10 provides that:
> "The Court, jury or enforcee must hear such legal evidence as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:
>
> (1) The value of the property sought to be condemned, and all improvements thereon appertaining to the realty, and of <u>each and every separate estate</u> or <u>interest therein</u> . . .
> (5) As far as practicable, compensation must be assessed for each source of damages separately." (78-34-10, U.C., '88'89) (Emphasis added)

Defendants prepared their claims for damages and just compensation to include the mineral rights taken and were prepared to present those claims at trial.

Defendants advised plaintiff that their mineral experts would testify including Don Curry, Mineral Engineer, Pete Bunger, Mineral Chemist and mineral broker and rebuttal witness Ken Santini, Mineral Engineer, as needed.

A proffer of proof was made to the Court prior to opening arguments as to the issue of mineral rights and the values to the underlying minerals included in the taking were valued in amounts exceeding $38 million dollars. Defendants also proffered that removal of the minerals would not support the overlying surface rights claimed by plaintiff.

On February 9, 1988, plaintiff, for the first time, decided that the town ws bound by Utah statutes and therefore

plaintiff determined that Section 78-34-2, U.C., '88-89, did not allow them to take fee simple to the Koller land and so plaintiff orally petitioned the Court for leave to amend its Complaint a second time and to allow the town of Cornish to abandon its claim for mineral rights, to abandon its claim for fee simple and petitioned that the town be allowed to amend its Complaint to provide that a taking be a perpetual easement only. The Court granted that motion. (Tr. Vol. I at 10 and Vol. II at 15)

The town of Cornish in its own proposed Judgment of Special Verdict admits to the abandonment of its claim to mineral rights.

> On February 9, 1988, plaintiff moved to amend its Complaint to request that a perpetual easement rather than a fee simple may be taken over the surface ground of the areas being acquired as protection zones, reservoir and pump house sites and the non-tillable or dry grazing-sidehill area above the pipeline as more fully described in the amended complaint." (Emphasis added)

The town admitted that the motion for leave to amend to abandon its claim for fee simple was made specifically because of defendants' claim that the mineral rights were commercially valuable and the town could not afford to purchase those mineral rights.

Defendants submitted their Affidavit of Fees, Expenses and Costs incurred in preparation for the issue of value of mineral rights including legal fees of $16,840.40, costs advanced of $1,551.27 (R. 835) and expenses of $19,747.61 (R. at 759).

This Court has considered and upheld the statutory right of defendants to attorney's fees and costs when a condemnor

abandons its claims in condemnation in Provo City Corp. v. Cropper, 497 P.2d 629 (Utah, 1972). In this case, the condemning authority advised the Court in pre-trial that it intended to withdraw its claim and dismiss its action and that defendant's property was no longer needed for public use. Because of plaintiff's representations, the case was stricken from the trial calendar. The Supreme Court held that plaintiff had abandoned its claims and that defendant had a right to recover fees and costs. No matter the fact that the claim was still of record and had not been formally dismissed.

In the present action, plaintiff amended its Complaint and abandoned its claim for fee simple title to the property and abandoned the claim for mineral rights. This Court has long held that an amended complaint is a dismissal of claims and abandonment of claims in the complaint that are not raised in the amended complaint.

> "The law is overwhelming to the effect that when an amended complaint, complete in and of itself is filed, the former complaint is functus officio and cannot be used for any purpose."

Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 222 v. Motor Cargo, 530 P.2d 807 (1974).

When the claimant files an amended complaint, the amendment abandons the former cause of action. The original pleading is considered abandoned and ceases to perform any function. A claim raised in the Complaint and not raised in the

Amended Complaint is therefore dismissed. Fluke Capital & Management Service Co. v. Richmond, 724 P.2d 356 (Wash., 1986).

The proceedings in this action were to obtain fee simple title. The action for fee simple title was abandoned by amending the Complaint after the Jury was selected, and that claim or action was dismissed by order of the Court that plaintiff could amend its Complaint after the commencement of trial to assert a claim for perpetual easement only. At the entry of an Order of Immediate Occupancy, plaintiff knew that the defendants were required to defend and carry the burden of proof of defendants' claim of greater value than the value indicted by plaintiff's appraiser.

The abandonment and dismissal of their claim for fee simple title to the property should give rise to the statutory award to defendants of costs, expenses and attorney's fees. The Court denied the claim for fees and costs. (R. at 859)

These issues are exhaustingly treated in Annotation 92 A.L.R.2d 355 and 68 A.L.R.3d 610 (copy of annotation, R. at 870).

The fact that plaintiff abandoned only part of its claim has been considered by a number of jurisdictions and each of those courts have held that partial abandonment gives rise to liability for attorney's fees, costs and expenses incurred as to the portion of the claims that have been abandoned. Akana v. Felix, 261 F.2d 773 (9th Cir. Hawaii, 1958); Dept. of Public Works v. Lauter, 153 N.E.2d 552 (Ill., 1958).

People by Dept. of Transportation v. Northern Trust Co., 376 N.E.2d 286 (Ill. App., 1978); Independent School District v. Gross, 190 N.W.2d 651 (Minn., 1973); State Dept. of Natural Resources v. Sellers, 237 N.E.2d 328 (Ohio, 1979); Atherton v. State Conservation Commission, 203 N.W.2d 620 (Iowa, 1978).

The identical issues to the case at bar were considered in Merced Irrigation Dist. v. Woolstenhulme, 483 P.2d 1 (Calif., 1971) (Copy of case, R. 846). In the initial complaint, the irrigation district sought to condemn a fee interest in property parcels designated 1, 2, 4 and 5 and the cattle grazing and watering rights to 199.9 acres of land designated as parcel 3. The district filed an amended complaint seeking a complete fee interest in 117 acres in parcel 3 and dropped the demand for grazing and water rights. The amended complaint excluded the claim for parcels 4 and 5 completely. The trial court held that the amended complaint constituted a partial abandonment and the Supreme Court upheld that determination.

The California statute is the same requirement as the Utah statute. It is designed to compensate a defendant for expenses incurred in anticipation of an eminent domain proceeding, when the condemner declines to carry the proceeding through to its conclusion. When plaintiff amended its complaint, it abandoned its efforts to acquire 82.9 acres in fee simple, and attorneys' fees and costs should be awarded based upon the costs incurred by defendants allocated to that portion of the

proceeding. A California case identical to the case at bar is County of Kern v. Galatas, 200 Cal.App.2d 353, 19 Cal.Rept. 348 (Cal.App., 1962) (copy of case R. 865). The county abandoned its claim for mineral rights and amended its complaint to take land only and not the mineral rights by condemnation. The court held that defendant land owners were entitled to legal fees and costs incurred as to the abandoned claims to condemn mineral rights.

The town demanded the right to condemn fee simple title under section 78-34-1, U.C., '87-88, for a public use. The determination of what is a public use is a judicial determination, not just a legislative assertion, but a determination that the fee simple title demanded was in fact a public use for which the town had a right to condemn defendants' property (see Pordova v. City of Tucson, 494 P.2d 52 (Ariz. App., 1972).

The town determined that fee simple title was necessary for protection and preservation for part of the town's water supply. Such a determination is claimed to be a public use for proper exercise of the power of eminent domain. City of Tacoma v. Welcher, 399 P.2d 330 (Wash., 1965).

The clear intent of the town in its claims was to obtain fee simple title and such is presumed by statute when the taking was for a public use and was the intent expressed in the demand for taking. Olsen v. Board of Education, 571 P.2d 1336 (Utah, 1977).

In Elliott v. City of Guthrie, 725 P.2d 861 (Okla., 1986), the Court held that when fee simple title was reasonably necessary or requisite to the designated public use, and that concurrent use of other interest owners of land was not desirable because of the necessity of protecting the purity of the water supply, then the designated fee simple title for public use would take precedence over the mere easement right designated for rights-of-way by the statute.

The town represented that a quantum of less than fee simple would frustrate and destroy its intended use that being the claim, the legislature intended the appropriation of the fee "for all other public uses for the benefit of the . . . town." 78-34-1, U.C., '87-88. Section 78-34-2 does not mandate a lesser estate but classifies the estate or quantum to be taken unless the condemning authority requires a greater estate for its declared public purpose. The Court foreclosed the provisions as to the quantum of the estate or the public need and necessity with its Order of Immediate Occupancy, leaving the defendants with the burden of proving the value of their mineral interests and the value of the land taken in fee simple.

V

WHETHER DEFENDANTS ARE ENTITLED TO SUBMIT EVIDENCE OF THE VALUE OF PROSPECTIVE BUSINESS VENTURE IN THE PROPERTY.

Defendants were prohibited from putting evidence to the jury as to the retail value of hunting access permits to hunt

deer on defendants' property. (Jury Instruction No. 28,R. 739, Tr. Vol. I, at 80 & Vol. II at 91)

The loss of business potential may be introduced in evidence to show a diminution of the highest and best use for the property, not for the purpose of showing loss of profits or income. State ex rel Herman v. Schaffer, 467 P.2d 66 (Ariz., 1970). That was the specific reason for offering that evidence. (Tr. at 86) The loss of that business opportunity should be submitted to the jury just as the loss of grazing access was held to be a proper claim for determining severance damages in State By and Through Road Commission v. Larkin, 495 P.2d 817 (Utah, 1972). The evidence that should be presented to the jury should be any evidence which will aid the jury in fixing the fair market value of the property. It should not be merely speculation, but evidence which would be considered by a prospective vendor or purchaser or which would tend to enhance or appreciate the value of the property taken. State v. Kunimoto, 617 P.2d 913 (Hawaii, 1980).

The future use for sale of hunting access permits is reasonable evidence for probable future use, and competent evidence which would tend to show the value of that use should have been admitted. State By Attorney General v. Pioneer Mill Co., 637 P.2d 1131 (Hawaii, 1981). Evidence to show that certain income producing use at the time of condemnation was reasonably probable is admissible, and expert testimony as to a legitimate

income stream from that future use should be admissible. City & County of Honolulu v. International Air Service Co., Inc., 628 F.2d 192 (Hawaii, 1981), and State Dept. of Highways v. Mahaffey, 697 P.2d 773 (Colo. App., 1984).

VI

WHETHER DEFENDANTS' COSTS AWARDED SHOULD INCLUDE THE COSTS OF PREPARATION AND PRESENTATION OF TRANSCRIPTS AND EXHIBITS USED IN TRIAL.

Defendants petitioned an award of costs totalling $2,252.65 (R. 833). Costs are generally allocable only in the amount and in the manner provided by Statute. The trial court has the discretion in regard to the allowance of costs and has the duty to guard against any excesses or abuses in the taxing of costs. Frampton v. Wilson, 605 P.2d 771 (Utah, 1980).

Rule 54(4)(1):

> "Costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ."

The trial court may exercise reasonable discretion in regard to the allowance of costs. Costs are taxable in condemnation cases. Sigurd City v.State, 142 P.2d 154 (Utah, 1943).

Costs means those fees which are required to be paid to the Court and to witnesses. The Court approves the costs of depositions as the taxing of costs and the costs of transcripts of record should be equal thereto. The same is also true in the taxing of costs on appeal for the costs of the transcript of record. The exhibits produced by defendants are necessarily

required in condemnation proceedings when the property is not personally viewed by the jury and the jury must visualize the property through photographs and graphic exhibits. Extraordinary as these costs and expenses are, they are unique to the defendants' burden of proving greater value, they are required because of plaintiff's statutory right of condemnation, and should be taxable as costs herein.

CONCLUSION

1. Defendants have a right to have the issue of public need and necessity determined by the jury.

2. The appropriate and proper date of taking was the regulatory taking by town Ordinance 81-1 in September, 1981.

3. The Court's permitting amendment of Complaint and prohibiting defendants from submitting the value of the underlying mineral rights to the jury should be reversed or remanded for determination of the value of the mineral rights taken.

4. Defendants have a right to an award of costs, expenses and attorney's fees incurred after demand for title in fee simple was abandoned by plaintiff.

5. The defendants should be permitted to submit the evidence of value of access permits for hunting to determine the value of the highest and best use of the property.

6. Defendants have a right to be awarded costs incurred for photographs, graphic exhibits and transcripts of preliminary hearings as a proper taxing of costs herein.

THEREFORE, the decision of the trial court should be reversed and and the matters remanded for trial and further determination consistent with this Court's determinations.

DATED this 8th day of August, 1988.

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CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellants to Jody K. Burnett, Snow, Christensen & Martineau, Attorneys for Plaintiff and Respondent, 10 Exchange Place, 11th Floor, P. O. Box 45000, Salt Lake City, Utah 84145, this ____ day of August, 1988.

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